No. 18-483

In the Supreme Court of the United States

KRISTINA BOX, COMMISSIONER,
INDIANA DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA
AND KENTUCKY, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* SUSAN B. ANTHONY LIST IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Court's abortion precedents protect the eugenic practice of Down syndrome discrimination abortion.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Susan B. Anthony List ("SBA" or "SBA List") is a "pro-life advocacy organization," *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2339 (2014) (internal quotation marks omitted), dedicated to reducing and ultimately eliminating abortion by electing national leaders and advocating for laws that save lives, with a special calling to promote pro-life women leaders.

SBA List combines politics with policy, investing heavily in voter education to ensure that pro-life Americans know where their lawmakers stand on protecting the unborn, and in issue advocacy, advancing pro-life laws through direct lobbying and grassroots campaigns.

SBA List supports policies designed to reduce and eliminate the eugenic practice of Down syndrome discrimination abortion. Research has shown that individuals with Down syndrome are among the happiest people in the world and bring tremendous joy to their families. In some Western nations, however, children diagnosed with Down syndrome are on the verge of being eliminated from society through selective abortion.

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[1] No counsel for a party authored this brief in whole or part. No one other than *Amicus Curiae* Susan B. Anthony List or its counsel made a monetary contribution to the preparation or submission of this brief. On or before November 5, 2018, counsel of record for all parties received notice that *Amicus Curiae* Susan B. Anthony List intended to file this brief. All parties have consented to the filing of this brief.

SBA List is deeply involved in the process of persuading fellow citizens of the rightness of its cause and effecting change through political processes. SBA List strongly supports the proposition that this Court should allow citizens of this country to determine abortion policies through democratic processes.

SUMMARY OF THE ARGUMENT

1. If the Court denies review of the Down syndrome protections at issue in this case, lower courts and future litigants would benefit from an accompanying statement clarifying that such policies present a question of first impression under this Court's abortion precedents.

To date, 12 federal judges in two circuits have split eight to four on whether this Court's abortion precedents protect the eugenic practice of Down syndrome discrimination abortion.

Eight judges have adopted or endorsed the view that the rule of viability set out in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), categorically excludes any previability abortion restriction.

On the other side of the split, Circuit Judge Frank H. Easterbrook, Circuit Judge Diane S. Sykes, Circuit Judge Amy Coney Barrett, and Circuit Judge Michael B. Brennan have endorsed the view that whether government may prohibit the eugenic practice of Down syndrome discrimination abortion presents a question of first impression under the abortion precedents of this Court. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, No.

17-3163, 2018 U.S. App. LEXIS 17676, at *10 (7th Cir. Jun. 25, 2018) (Easterbrook, J., dissenting).

Amicus strongly supports a grant of review in this case. At the same time, *Amicus* respectfully submits that, if the Court denies review of the Down syndrome protections at issue in this case, lower courts and future litigants would nevertheless greatly benefit from an accompanying statement clarifying that whether the U.S. Constitution bars such protections presents a question of first impression under the abortion precedents of this Court.

2. If the Court grants review, it may uphold Indiana's Down syndrome protections without disturbing the Court's abortion precedents.

As Circuit Judges Easterbrook, Sykes, Barrett, and Brennan persuasively argue, this Court's abortion precedents do not address much less settle the question whether government may prohibit the eugenic practice of Down syndrome discrimination abortion. Accordingly, the Court could uphold such a law without disturbing those underlying precedents.

Arguments developed by University of Georgia Law Professor Randy Beck provide another path to upholding Down syndrome protections without overturning the general rule of viability. Under this approach, the Court would recognize that different durational rules apply to different government interests in regulating abortion. The Court would then clarify that the viability rule does not attach to regulations advancing the government interest in prohibiting Down syndrome discrimination.

3. The Court should grant the petition and abandon the viability rule.

The Supreme Court has overruled its prior decisions in more than 230 cases. Clarke D. Forsythe, *Article: A Draft Opinion Overruling* Roe v. Wade, 16 Geo. J.L. & Pub. Pol'y 445, 448 (2018). It should do so again in this case by granting the petition and abandoning the viability rule.

In a 2012 article published in the Notre Dame Law Review, University of Georgia Law Professor Randy Beck explains that the Court has made exceptions to the general rule of stare decisis in three types of situations.

(1) When an earlier Court "purported to resolve issues not raised by the case before it."

(2) When an earlier Court "acted based on inadequate briefing or cursory deliberation."

(3) When an earlier Court "failed to adequately explain the reasoning underlying a legal conclusion."

Randy Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 Notre Dame L. Rev. 1405, 1429 (2012) [hereinafter Beck, *Law of Precedent*].

When a previous ruling suffers from one or more of these three defects, Professor Beck explains, the Court is freed from strict adherence to stare decisis and may take corrective action, such as when the Court "narrowly construes prior decisions," "accords diminished precedential weight," or "denies stare decisis effect altogether." *Id.*

Professor Beck argues that each of these three exceptions to stare decisis applies to the viability rule established in *Roe* and affirmed in *Casey*.

Freed from the constraint of strict adherence to unworthy precedent, the Court enjoys an array of excellent reasons to abandon the viability rule on its merits. To provide just one example here, the point at which a child attains viability—and thus becomes eligible for legal protection in jurisdictions that provide it—can vary based on factors including race, whether the mother smokes, access to treatment facilities, and even altitude.

ARGUMENT

I. If the Court denies review of the Down syndrome protections at issue in this case, lower courts and future litigants would benefit from an accompanying statement clarifying that such policies present a question of first impression under this Court's abortion precedents.

To date, 12 federal judges in two circuits have split eight to four on the question whether *Roe* and *Casey* protect the eugenic practice of Down syndrome discrimination abortion. *Amicus* strongly supports a grant of review in this case. If the Court denies review of the Down syndrome protections at issue in this case, lower courts and future litigants nevertheless would greatly benefit from an accompanying statement clarifying that such policies present a question of first impression under this Court's abortion precedents.

A. To date, 12 federal judges in two circuits have split eight to four on whether this Court's abortion precedents protect the eugenic practice of Down syndrome discrimination abortion.

The question whether government may prohibit the eugenic practice of Down syndrome discrimination abortion has not yet produced a formal split between courts. *See* Amanda Stirone, *Overview of Legislation and Litigation Involving Protections Against Down Syndrome Discrimination Abortion*, Charlotte Lozier Inst., Nov. 14, 2018 (summarizing litigation to date), https://lozierinstitute.org/overview-legislation-litigation-involving-protections-against-down-syndrome-discrimination-abortion/. However, even at this early stage, a divergence has begun to emerge in the opinions held by individual federal judges. To date, 12 federal judges in two circuits have split eight to four on the question whether this Court's abortion precedents protect the eugenic practice of Down syndrome discrimination abortion. A 13th judge in a third circuit sidestepped the issue on grounds of standing.

This split in federal judicial opinion, some of it expressed in rulings of the court and some of it expressed in a concurring or dissenting opinion, puts the "categorical approach" in contest with the "question-of-first-impression approach."

The categorical approach holds that the viability rule set out in *Roe* and *Casey* categorically excludes any previability abortion restriction including prohibitions on the eugenic practice of Down syndrome discrimination abortion.

The categorical view has been adopted by the district court judge in *Pre-Term Cleveland v. Lance Himes*, 294 F. Supp. 3d 746, 752 (S.D. Oh. 2018), the district court judge in the present case, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859, 866-67 (S.D. Ind. 2017), and the three-judge circuit court panel in the present case, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 306 (7th Cir. 2018). The categorical approach has also been endorsed by three circuit judges concurring in the decision of the Seventh Circuit to deny en banc review in the present case. *See PPINK*, 2018 U.S. App. LEXIS 17676, at *3 (Wood, C. J., concurring in denial of en banc review).

On the other side of the split is the view that Down syndrome protections present a constitutional question of first impression under the abortion precedents of this Court. This is the question-of-first-impression approach.

To date, the question-of-first-impression approach has been endorsed by Circuit Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit, in his opinion dissenting from the Seventh Circuit's denial of en banc review in the present case, *PPINK*, 2018 U.S. App. LEXIS 17676, at *10 (Easterbrook, J., dissenting), as well as by Circuit Judge Diane S. Sykes, Circuit Judge Amy Coney Barrett, and Circuit Judge Michael B. Brennan, each of whom joined Judge Easterbrook's dissenting opinion, *id.*

A 13th judge in a third circuit sidestepped the issue on grounds of standing. *See June Med. Servs. LLC v. Rebekah Gee*, 280 F. Supp. 3d 849, 861 (M.D. La. Nov. 16, 2017).

B. The Court need not answer the underlying constitutional issue to clarify that Down syndrome protections present a question of first impression under this Court's abortion precedents.

Amicus strongly supports a grant of review in this case. At the same time, *Amicus* respectfully submits that, if the Court denies review of the Down syndrome protections at issue in this case, lower courts and future litigants would nevertheless greatly benefit from an accompanying statement clarifying that whether the U.S. Constitution bars such protections presents a question of first impression under the abortion precedents of this Court.

Such a statement need not say whether a law prohibiting the eugenic practice of Down syndrome abortion withstands constitutional scrutiny. Significant utility would be gained from even a more limited statement simply clarifying that this Court's abortion precedents do not answer this newly presented question regardless to what extent the principles articulated by those precedents may bear on the resolution of such a case. Accordingly, the question is one that lower courts remain free to answer in the light of the Constitution and relevant precedents, until this Court should choose to provide its own answer.

II. If the Court grants review, it may uphold Indiana's Down syndrome protections without disturbing the Court's abortion precedents.

The Court enjoys at least two options for upholding prenatal Down syndrome protections without disturbing the viability rule set out in *Roe* and *Casey*. As Circuit Judges Easterbrook, Sykes, Barrett, and Brennan argue, the question is one of first impression under this Court's abortion precedents. Arguments developed by University of Georgia Law Professor Randy Beck provide a second path.

A. As Circuit Judges Frank H. Easterbrook, Diane S. Sykes, Amy Coney Barrett, and Michael B. Brennan argue, restrictions on eugenic abortion present a question of first impression under Supreme Court abortion precedents.

In the split of opinion between federal judges on the question of whether this Court's abortion precedents protect eugenic abortion, *see supra*, Section I.A., Circuit Judges Frank H. Easterbrook, Diane S. Sykes, Amy Coney Barrett, and Michael B. Brennan have the better position. This Court's abortion precedents simply do not address whether states may restrict the practice of eugenic abortion. Whether a Down syndrome antidiscrimination law violates the general right to abortion located by this Court in the U.S. Constitution presents a question of first impression for this Court.

In the words of Circuit Judge Easterbrook's opinion dissenting from denial of en banc review in the instant case, "Judicial opinions are not statutes; they resolve

only the situations presented for decision." *PPINK*, 2018 U.S. App. LEXIS 17676, at *11 (Easterbrook, J., dissenting). And in *Casey*, Judge Easterbrook explains, the Supreme Court "did not consider the validity of an anti-eugenics law." *Id.*

Judge Easterbrook cites to the compelling "parallel" of public policy exceptions to the general rule of at-will employment. *Id.* "Judges often said that employers could fire workers for any or no reason. That's the doctrine of employment at will. But by the late twentieth century," Judge Easterbrook explains, "courts regularly created exceptions when the discharge was based on race, sex, or disability. *Casey* does not tell us whether a parallel 'except' clause is permissible for abortions." *Id.*

Judge Easterbrook continues this powerful line of argumentation. "*Casey* and other decisions hold that, until a fetus is viable, a woman is entitled to decide whether to bear a child. But there is a difference," Judge Easterbrook observes, "between 'I don't want a child' and 'I want a child, but only a male' or 'I want only children whose genes predict success in life.' Using abortion to promote eugenic goals," Judge Easterbrook writes, "is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." *Id.* at *12.

The bottom line in this argument is that, in Judge Easterbrook's words, "None of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." *Id.* Accordingly, the Court could uphold a Down syndrome antidiscrimination law

without disturbing its precedents establishing a general right to abortion.

B. Arguments developed by University of Georgia Law Professor Randy Beck offer a second path for upholding Down syndrome protections without disturbing the rule of viability set out in *Roe* and *Casey*.

Randy Beck is Associate Dean for Academic Affairs and Justice Thomas O. Marshall Chair of Constitutional Law at the University of Georgia School of Law. He has authored several scholarly articles discussing the general abortion rule of viability.

Professor Beck certainly offers many criticisms of the viability rule itself. However, he also offers a simple but elegant argument for how the Court could uphold a pain-capable 20-week abortion law without discarding the viability rule.

Here, *Amicus* sets out Professor Beck's unique argument for pain-capable 20-week laws and then applies that argument to Down syndrome protections.[2]

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[2] With permission of the author, a counsel on this brief, this section of the brief draws from arguments developed by Thomas M. Messner including in *Ohio Vigorously Defends Down Syndrome Antidiscrimination Law*, Charlotte Lozier Inst., Mar. 21, 2018 (applying Beck's 20-week arguments to Down syndrome protections).

i. *Roe* stands for the proposition that different durational rules may attach to different government interests.

The first part of Professor Beck's innovative argument comes directly from the 1973 *Roe v. Wade* decision itself.

Beck observes that *Roe* "took the position that the point at which a particular state interest would justify substantial restrictions on abortion depended on the particular state interest in question." Randy Beck, *State Interests and the Duration of Abortion Rights*, 44 McGeorge L. Rev. 31, 55 (2013) [hereinafter Beck, *State Interests*].

Under *Roe*, Beck explains, "an interest in promoting maternal health justified regulation at the end of the first trimester," *id.* whereas the "interest in protecting fetal life justified regulation only at viability," *id.*

In other words, in *Roe* the Court imposed two different durational rules, one for one state interest and one for a different state interest. Accordingly, *Roe* stands for the proposition that different durational rules attach to different government interests.

ii. *Gonzales v. Carhart* stands for the proposition that government may lawfully assert different interests than those at stake in *Roe* and *Casey*.

The second part of Beck's argument comes from this Court's ruling in *Gonzales v. Carhart*, 550 U.S. 124

(2007), which upheld the federal Partial-Birth Abortion Ban Act of 2003.

In *Gonzales*, Beck writes, "the Court saw the statute as furthering a multiplicity of state interests distinct from the interest in protecting the life of any particular fetus." Beck, *State Interests*, *supra* at 55. "The statute was thought to preserve respect for human life among the public and the medical profession, protect the ethics and reputation of medical personnel, and clarify the distinction between abortion and infanticide." *Id.*

Accordingly, *Gonzales* stands for the proposition that government may lawfully assert different interests in regulating abortion than the interests at stake in *Roe* and *Casey*.

iii. Together, *Roe* and *Gonzales* stand for the proposition that the durational rule of viability need not attach to every government interest in regulating abortion.

Professor Beck combines the legal principles derived from *Roe* and *Gonzales* into a single, powerful argument.

Professor Beck acknowledges that "the *Gonzales* opinion 'assumed' that the viability rule would remain the measure of the duration of abortion rights." Beck, *State Interests*, *supra* at 55. He argues, however, that, "[j]ust as the states could assert the distinct interests recognized in *Roe* at different points in pregnancy, now that *Gonzales* permits states to advance previously unrecognized interests in support of abortion regulations, there is no reason all of those interests should be subject to the same durational line." *Id.*

Professor Beck specifically applies this argument to pain-capable 20-week abortion limits. "Consider, for example," he writes, "the state laws passed in a number of jurisdictions forbidding most abortions after twenty weeks of pregnancy on the theory that the fetus can feel pain at that stage of development." *Id.*

Professor Beck argues that "[t]he Court could appropriately confine the viability rule to the state interest the Court designed the rule to cover, a purely moral assessment of the value of unborn human life, and recognize different durational limits for the new state interests now permitted under *Gonzales*," *id.* at 56, such as the state interest in protecting pain-capable children.

Professor Beck's argument would allow the Court to uphold a pain-capable 20-week abortion limit without overturning the general rule of viability.

iv. The government interest in prohibiting eugenic abortion is different from the government interest at stake in *Roe* and *Casey* and should not be subject to the same durational rule.

So far as *Amicus* is aware, Professor Beck has not addressed the issue of Down syndrome discrimination abortion directly. That said, *Amicus* contends that Professor Beck's innovative argument for pain-capable 20-week laws leads to the same result when applied to Down syndrome antidiscrimination protections.

Just as Professor Beck argues with respect to pain-capable 20-week laws, in considering a Down

Syndrome abortion ban "[t]he Court could appropriately confine the viability rule to the state interest the Court designed the rule to cover, a purely moral assessment of the value of unborn human life, and recognize different durational limits for the new state interests now permitted under *Gonzales*," *id.*, such as the state interest in protecting unborn children from unjust discrimination.

Under this approach, the Court could uphold a prohibition on the eugenic practice of Down syndrome discrimination abortion without disturbing the general rule of viability set out in *Roe* and *Casey*.

III. The Court should grant the petition and abandon the viability rule.

The Supreme Court has overruled its prior decisions in more than 230 cases. Clarke D. Forsythe, *Article: A Draft Opinion Overruling* Roe v. Wade, 16 Geo. J.L. & Pub. Pol'y 445, 448 (2018). It should do so again by granting review in this case and abandoning the viability rule.

A. Professor Beck has identified three situations where this Court limits the weight normally accorded to precedent under the general rule of stare decisis. Each exception applies with full force to reconsideration of the viability rule.

In his 2012 Notre Dame Law Review article *Transtemporal Separation of Powers in the Law of Precedent*, Professor Beck discusses three situations

where the Court has recognized limitations to the general rule of stare decisis.[3]

(1) When an earlier Court "purported to resolve issues not raised by the case before it."

(2) When an earlier Court "acted based on inadequate briefing or cursory deliberation."

(3) When an earlier Court "failed to adequately explain the reasoning underlying a legal conclusion."

Beck, *Law of Precedent*, *supra* at 1429.

When a previous ruling suffers from one or more of these three defects, Professor Beck explains, the Court is freed from strict adherence to stare decisis and may take corrective action, such as when the Court "narrowly construes prior decisions," "accords diminished precedential weight," or "denies stare decisis effect altogether." *Id.*

Professor Beck argues that each of these three exceptions to stare decisis applies to the viability rule established in *Roe* and affirmed in *Casey*. In Professor Beck's words, "the Court should not view the viability rule as binding precedent precluding future examination of the duration of abortion rights on the basis of plenary briefing and argument." *Id.* at 1464.

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[3] With permission of the author, a counsel on this brief, this section of the brief draws heavily from Thomas M. Messner, *Former Kennedy Law Clerk Argues Stare Decisis No Obstacle to Reversing Roe and Casey's "Viability Rule,"* Charlotte Lozier Inst., Nov. 9, 2018.

i. The first exception to stare decisis – Dictum versus holding – Professor Beck argues that "the issue of the duration of abortion rights was not before the Court" in *Roe* or *Casey*.

The first exception to stare decisis identified by Professor Beck centers on situations where an earlier court "purported to resolve issues not raised by the case before it." *Id.* at 1429. Professor Beck argues that the viability rule suffers from this defect.

In Professor Beck's view, the *Roe* Court's "articulation of the viability rule constituted dictum, unnecessary to resolve the case before the Court." *Id.* at 1460. Professor Beck writes that "[t]he *Roe* litigation involved a challenge to a Texas statute that prohibited *all* abortions except those necessary to save the mother's life." *Id.* (emphasis added). Professor Beck explains that the *Roe* Court "concluded that a woman has a fundamental right to terminate an unwanted pregnancy and that the states lack a compelling interest in protecting fetal life *at the outset of pregnancy*." *Id.* (emphasis added). Once the Court reached this conclusion, Professor Beck contends, "the invalidity of the [Texas] statute was established *regardless of how far into pregnancy the right to an abortion extends.*" *Id.* (emphasis added). In other words, "[t]he validity of the Texas statute did not turn on the question of *when in pregnancy* a state may regulate to protect fetal life." *Id.* (emphasis added).

Professor Beck views the Court's "internal deliberations in *Roe*" as confirmation "that the viability rule represented an attempt to resolve an issue not

presented by the pending litigation." *Id.* at 1461. Professor Beck explains that "[t]he files of Justice Blackmun and other retired Justices show that the viability rule did not make its way into the *Roe* opinion until the third draft circulated to the Court." *Id.*

"Justice Blackmun's acknowledgement that *Roe's* second draft included dictum, Justice Stewart's identification of the first-trimester cutoff as part of that opinion's dicta, and the fact that the third draft's shift to a viability cutoff did not alter the Court's analysis," Professor Beck argues, "all show the majority's awareness that adoption of the viability rule was unnecessary to review of the Texas statute." *Id.*

Professor Beck argues that *Casey* suffers from the same flaw and does "not cure the defects in the *Roe* Court's defense of the [viability] rule." *Id.* at 1463. "[A]s in *Roe*," Beck writes, "the Pennsylvania regulations at issue in *Casey* applied from the outset of pregnancy. As a consequence, the reaffirmation of the viability rule in *Casey* also represented dictum, unnecessary to resolution of the issues before the Court." *Id.*

ii. The second exception to stare decisis – Inadequate briefing and argumentation.

The second exception to stare decisis identified by Professor Beck centers on situations where an earlier court "acted based on inadequate briefing or cursory deliberation." *Id.* at 1429. Professor Beck argues that the viability rule suffers from this defect too.

According to Professor Beck, the parties in *Roe* "did not address the question of, assuming a right to

abortion, how far into pregnancy it extends." *Id.* at 1462. He writes that "[t]hose challenging the Texas statute denied that the state possessed a compelling interest in fetal life that would support the legislation as written *but did not speculate about whether a more narrowly drawn statute might further such an interest*" *Id.* (emphasis added). At the same time, according to Professor Beck, "[t]he defenders of the statute claimed a compelling state interest in protecting fetal life *from the outset of pregnancy.*" *Id.* (emphasis added). Moreover, Beck asserts, at oral argument the advocates "avoided answering such line-drawing questions." *Id.*

The bottom line here is that, according to Professor Beck, the *Roe* Court "adopted the viability rule without the benefit of adversarial briefing or argument on the duration of abortion rights." *Id.*

Professor Beck further argues that *Casey* did not cure this defect. According to Professor Beck, "the parties in *Casey* did not brief the Court on potential arguments for or objections to the viability rule." *Id.* at 1463.

iii. The third exception to stare decisis – Inadequate legal justification.

The third exception to stare decisis identified in Professor Beck's research centers on situations where the Court has "failed to adequately explain the reasoning underlying a legal conclusion." *Id.* at 1429. Professor Beck argues that the viability rule also suffers from this defect.

Professor Beck writes that "scholars have long recognized that the Court utterly failed to justify the

viability rule." *Id.* at 1462. Professor Beck quotes Professor John Hart Ely explaining that *Roe's* discussion of viability "seem[ed] to mistake a definition for a syllogism," Professor Laurence Tribe writing that the *Roe* opinion "offers no reason at all for what the Court has held," and Professor Christopher Eisgruber describing the *Roe* Court's defense of the viability rule as "blatantly circular." *Id.* at 1462–63 (internal quotation marks omitted).

Clarke D. Forsythe and Stephen B. Presser provide additional examples of scholars who have "recognized the lack of any constitutional foundation for *Roe*." Clarke D. Forsythe and Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 Tex. Rev. Law. & Pol. 301, 313 (2006) [hereinafter Forsythe and Presser, *A Federalism Amendment*]. "Many renowned constitutional scholars—including Alexander Bickel, Archibald Cox, John Hart Ely, Philip Kurland, Richard Epstein, Mary Ann Glendon, Gerald Gunther, Robert Nagel, Michael Perry, and Harry Wellington—have recognized the lack of any constitutional foundation for *Roe*." *Id* at 313–14. The same authors also quote Justice Lewis Powell as referring to *Roe* and its companion case *Doe v. Bolton*, 410 U.S. 179 (1973) as "'the worst opinions I ever joined.'" Forsythe and Presser, *A Federalism Amendment*, *supra* at 315. *See also* Forsythe, *Draft Opinion*, *supra* at 458–72 (criticizing *Roe* including *Roe's* viability rule).

Professor Beck argues that "*Casey* did not rectify *Roe's* failure to justify the viability rule in constitutional terms." Beck, *Law of Precedent*, *supra* at 1463. "In attempting to justify the viability rule," Beck

explains, "the *Casey* plurality asserted that viability marks 'the independent existence of [a] second life' that 'can in reason and all fairness be the object of state protection that now overrides the rights of the woman.'" *Id.* However, "[t]his cryptic and conclusory justification left unaddressed a host of critical questions." *Id.*

B. The viability rule is unworkable, arbitrary, poorly reasoned, inadequate, and extreme.

Freed from the constraint of strict adherence to unworthy precedent, the Court enjoys an array of excellent reasons to abandon the viability rule.[4]

i. The viability rule is unworkable as a standard of regulation.

The viability rule is unworkable as a meaningful standard of regulation. In *Colautti v. Franklin*, 439 U.S. 379 (1979), this Court referred to "the uncertainty of the viability determination," *id.* at 395, explained that "different physicians equate viability with different probabilities of survival," *id.* at 396, and acknowledged that "the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty," *id.* *See* Beck, *State Interests*, *supra* at 37 (discussing *Colautti*).

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[4] With permission of the author, a counsel on this brief, this section of the brief draws heavily from Thomas M. Messner, *The Constitutional Viability of Five-Month Abortion Laws*, Charlotte Lozier Inst., Nov. 9, 2018.

Given these "uncertainties," the Court admitted, "it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability." *Id.* at 395.

For these reasons, the viability rule, at least in some cases, can be difficult if not impossible to enforce. As Professor Beck writes, although "all competent doctors should reach the same conclusion about the viability or nonviability of a particular fetus" in some circumstances, "[i]n cases nearer to the margin . . . two doctors might reasonably disagree about viability, just as they might disagree about the likely consequences of a particular medical treatment or the length of time a particular patient has to live." Randy Beck, *Overcoming Barriers to the Protection of Viable Fetuses*, 71 Wash. & Lee L. Rev. 1263, 1263 (2014).

ii. The viability rule is arbitrary. It can be influenced by factors such as race, access to treatment facilities, and even altitude.

In Professor Beck's view, "[t]he [v]iability [r]ule [i]s [a]rbitrary." Beck, *State Interests*, *supra* at 37.

Professor Beck finds that viability can be influenced by factors such as race, gender, whether the mother smokes, access to treatment facilities, and even the altitude of where the baby and mother live. *Id.* at 39–40.

Furthermore, "[d]ue to advances in neonatal care, the state may be able to protect a fetus from abortion today when, just a few years before, it would have been constitutionally disabled from protecting an identical fetus." *Id.* at 38–39. *See also Casey*, 505 U.S. at 860

("advances in neonatal care have advanced viability to a point somewhat earlier" than assumed at the time of *Roe*). In 1973, the *Roe* Court, while recognizing it "may occur earlier," stated that viability was "usually placed" at about seven months or 28 weeks. *Roe* 410 U.S. at 160. Just four decades later, in 2013, a federal district court recognized that "23 to 24 weeks gestational age is, on average, the attainment of viability." *Isaacson v. Horne*, 884 F. Supp. 2d 961, 968 (D. Ariz. 2012), *rev'd*, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014).

iii. The viability rule is poorly reasoned.

Professor Beck finds that "scholars from a wide variety of backgrounds have recognized" that "*Roe* literally provided no argument in favor of treating viability as the controlling line, much less an argument grounded in constitutional principles." Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 Nw. U.L. Rev. 249, 267 (2009) [hereinafter Beck, *Viability*]. *See also supra*, Section III.A.iii. In Professor Beck's own analysis, "[t]he Court has never offered an adequate constitutional justification for the viability rule." Beck, *State Interests*, *supra* at 32. *See also* Beck, *Viability*, *supra* at 280 (asserting that "[t]o date, the Court has failed to offer any theory showing why the Constitution prevents a legislature from protecting fetal life until the fetus can survive outside the womb").

Professor Beck further argues that "the Court has not grappled with the duration of abortion rights in a case where the answer mattered to the outcome." Beck, *State Interests*, *supra* at 33. *See* Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade's*

Trimester Framework, 51 Am. J. Legal Hist. 505, 513–26 (2011). According to Professor Beck, *Roe* and *Casey* involved review of laws that applied from the outset of pregnancy meaning that neither case turned on the duration of the abortion right. *See supra*, Section III.A.i. Professor Beck also finds that the parties in *Roe* and *Casey* did not brief arguments for and against the viability rule. *See supra*, Section III.A.ii.

iv. The viability rule is inadequate.

In his opinion dissenting from "the decision, the reasoning, and the judgment" of the Court in *Stenberg v. Carhart*, 530 U.S. 914, 979 (2000) (Kennedy, J., dissenting), Justice Kennedy set out three important principles respecting the role of state legislatures in regulating abortion. *See* Beck, *State Interests*, *supra* at 50 (Justice Kennedy's dissent in *Stenberg* "recognized the important role state legislatures play in mediating societal divisions over abortion").

First, "[w]hen the [*Casey*] Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a critical and legitimate role in legislating on the subject of abortion, as limited by the woman's right the Court restated and again guaranteed." *Stenberg*, 530 U.S. at 956–57 (Kennedy, J., dissenting).

Second, "[t]he political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential." *Id.* at 957.

Third, "[t]he State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of

some degree of consensus." *Id. Accord. Doe v. Bolton*, 410 U.S. 179, 191 (1973) (referring to the right of the State "to readjust its views and emphases in the light of the advanced knowledge and techniques of the day").

In the light of these principles, the viability rule is inadequate if it automatically precludes, without any further consideration, legislative efforts such as Indiana's to address modern issues such as Down syndrome discrimination abortion.

v. The viability rule is extreme compared with domestic opinion and international norms.

Professor Beck also argues that "[t]he [v]iability [r]ule [i]s [e]xtreme." Beck, *State Interests*, *supra* at 40.

The viability rule is extreme compared with public opinion in the United States. According to a May 2018 Gallup poll, 81% of those surveyed believed that abortion should be illegal in the last three months of pregnancy and 65% believed abortion should be illegal in the second trimester. The Gallup Org., *Topics A-Z: Abortion* (May 1-10, 2018), https://news.gallup.com/poll/1576/abortion.aspx.

The viability rule is also extreme compared to international norms. A 2014 study published by the Charlotte Lozier Institute found that the United States is one of only seven countries worldwide that permit elective abortion past 20 weeks. Angelina Baglini, *Gestational Limits on Abortion in the United States Compared to International Norms*, Charlotte Lozier Inst. (Feb. 24, 2014) http://lozierinstitute.org/internationalabortionnorms. This study puts the U.S.

in the top 5% of most permissive countries on abortion out of 198 countries analyzed. *Id.*

CONCLUSION

Amicus urges the Court to grant the petition and uphold Indiana's protections for unborn children with Down syndrome. If the Court denies review of the Down syndrome protections at issue in this case, *Amicus* submits that lower courts and future litigants would greatly benefit from an accompanying statement clarifying that whether the U.S. Constitution bars such protections presents a question of first impression under this Court's abortion precedents.

Respectfully submitted,

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